

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

Mark E. Gessner,

Plaintiff,

v.

**Case No. 3:11-cv-286
Judge Thomas M. Rose**

John S. Howard, et al.,

Defendants.

**ENTRY AND ORDER OVERRULING DEMAND TO
VACATE ORDER AND ENTRY FILED ON MAY 1, 2013.
DOC. 56.**

Pending before the Court is Plaintiff's Demand to Vacate Order and Entry Filed on May 1, 2013. Doc. 56. Therein, Plaintiff requests permission for a second extension of time to fully brief the Court on his opposition to the Report and Recommendation filed April 2, 2013. Plaintiff asserts that summary judgment should not be awarded on his claim that he was arrested without probable cause, as the law the magistrate judge found to provide probable cause for his arrest only applies to those in a public place. The Court finds that any objection to the Report and Recommendation on this theory would be futile. Plaintiff's own testimony shows that his encounter with the police began on the sidewalk, with him retreating as fast as possible without drawing undue attention to himself. Moreover, the police were actively engaged in a neighborhood sweep, attempting to locate a reported peeping tom in a neighborhood where this

had been reported before. In these unique circumstances, the police were warranted in leading Plaintiff from his porch to demand identification. Additionally, even if a reviewing court were to disagree with this analysis, they would certainly find that the arresting officer enjoyed qualified immunity from prosecution for his efforts, as it was not unreasonable for an officer in this position to believe his actions were constitutional. Finally, excluding these issues from trial will benefit all parties by allowing the jury to focus on the question which remains at issue: whether Plaintiff was subject to excessive force when he was arrested. Thus, Plaintiff's Demand to Vacate Order and Entry Filed on May 1, 2013, Doc. 56, is **OVERRULED**.

The case remains scheduled for a final pretrial conference on May 9 at 1:30 in chambers. Failure to appear for this conference may result in sanctions including possible dismissal of claims or entry of default.

DONE and **ORDERED** in Dayton, Ohio, this Tuesday, May 7, 2013.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE